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Contested spaces of transitional justice: legal empowerment in global post-conflict contexts revisited

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Abstract

This article critically examines the concept of legal empowerment as it has been used with reference to transitional justice, mapping its rise and impact based on a selection of case studies. In recent decades, international transitional justice advocacy has evolved dramatically, with practice increasingly emphasising the centrality of criminal accountability for violence, precisely as more holistic approaches have emerged that have broadened the remit of transitional justice. Post-conflict justice advocates have thus become professionalized transitional justice entrepreneurs working on issues such as democratic transitions, rule of law, and human rights. A legal empowerment discourse has emerged in a number of scholarly debates that discuss legalistic and normative issues related to the implementation of retributive and restorative justice mechanisms. In theory, the concept of legal empowerment addresses the issue of social exclusion in transitions, increasing the rights of the marginalized. In practice, however, legal empowerment has disappointed and raises several issues around its performance that are scrutinized in this article. Drawing on case studies in Nepal, Tunisia, and Bosnia-Herzegovina the authors analyse issues related to agency, institutions and structure, and argue for a needs-centred, participatory approach in place of the rights-based legal empowerment concept.

Keywords

transitional justice, legal empowerment, victims, grassroots, human rights

Word count

9,290 (including endnotes)

Introduction

In autumn 2013, George Soros, the founder of the Open Society Foundations, wrote that legal empowerment is “the process of increasing the capacity of ordinary people to exercise their human and civil rights as individuals or as members of a community.”¹ His statement is a recent example of how the concept of legal empowerment has permeated through the organizational structures of international organizations, donors and foundations to advocate grassroots-centred development strategies not only as a response to poverty areas, but also in post-conflict zones. This article critically discusses legal empowerment practices as they might impact the field of transitional justice, where they have more recently emerged alongside retributive and restorative strategies.² This analysis traces the rise of the legal empowerment discourse, and drawing on a number of case studies, examines the consequences of applying this concept in the field of transitional justice.

International transitional justice advocacy has evolved dramatically over time. While mechanisms to address the legacies of mass violence have broadened to include more holistic strategies in recent years, practices have nonetheless focused increasingly on criminal accountability for violations, often resulting in technocratic and legalistic approaches. As a result, transitional justice practitioners have become more professionalized and are involved in work encompassing democratic transitions, rule of law and human rights. A legal empowerment-oriented discourse, which emerged in the development field, has also surfaced in several scholarly debates on normative and legalistic issues associated with retributive and restorative justice practices.

The legal empowerment concept, as claimed by its advocates, addresses development issues in transitions, expanding the rights of the marginalized. A 2008 report of the Commission on Legal Empowerment of the Poor (CLEP) defines the concept as “a process of systemic change through which the poor and excluded become able to use the law, the legal system, and legal services to protect and advance their rights and interests as citizens and economic actors.”³ It is based on four pillars, including the rule of law and access to justice, property rights, labour rights, and business rights.⁴ The report furthermore recommends that post-conflict zones and countries in transition not only need regulations, but also effective institutions to enforce them and that their subjects (in particular the poor and marginalized) be in possession of a legal identity.⁵ Legal empowerment is considered a reform process built on parallel and coordinated interventions. “The whole process is to be understood as iterative and the relationship between the legal empowerment process and systemic change is mutually reinforcing,” the report mentions.⁶ Ironically, many of the requirements listed in the report to implement legal empowerment effectively in transition settings – including justice sector reform, appropriate procedural rights, legal education and knowledge about the courts, among others⁷ – are often precisely those likely to be lacking or require improvement after conflict or political violence, particularly in the fragile states that typify transitional contexts.

While the legal empowerment concept might appear promising in theory, in practice it raises several questions, especially in transitional justice contexts. First, it is questionable as to how well legal empowerment strategies can bolster transitions from conflict or authoritarian rule. As a case in point, some authors point out that in order to foster rights-based development, new redistribution measures have to be implemented, which go beyond legal reforms and require deep structural change.⁸ The selection of case studies in this article will provide additional empirical evidence that questions the usefulness of linking legal empowerment and transitional justice practices. Second, what role do states, donors, civil society and other actors play in the adoption of specific legal empowerment programmes during transitions? And finally, can legal empowerment initiatives advance the rights and interests of underprivileged or marginalized groups that are often times overlooked by transitional justice mechanisms? The article explores these questions through in-depth case studies of Nepal, Tunisia and Bosnia-Herzegovina. Based on these examples, the authors discuss a number of problems that remain unresolved despite legal empowerment initiatives. A better understanding of these issues is crucial to cope with current implementation difficulties faced by international organisations, donors and advocacy groups, in order to pave the road for more effective post-conflict justice efforts in the future. The issues include, for instance, the lack of agency of marginalized population in socio-political decision-making processes, weak state institutions, as well as challenging social, economic and political conditions on the ground. The objective of this study is to explore these problems within different geographic and socio-political settings, evaluating the role of legal empowerment. The authors argue that a rights-based approach is unsuited to such contexts and recommend that future initiatives centre more on need-oriented support and participatory approaches for local populations that seek a broader empowerment including the social, economic and political, rather than exclusively legal. To this end, the article first reviews some of the legal empowerment literature relevant to transitional justice scholarship, outlining various conceptual shortcomings for effectively implementing legal empowerment strategies in post-conflict and transitional justice contexts. The subsequent section briefly presents the methodology and research design used for this study. Then the authors elaborate on the Nepal, Tunisia and Bosnia case studies to illustrate their argument.

Literature review: legal empowerment, transitional justice, and rights versus needs

Although legal empowerment has become a buzzword in the field of international development since the creation of CLEP, the idea of empowerment in development is not new and its impact on transitional justice processes should not be overlooked. In 2001, for instance, Stephen Golub – at the time the project leader of a legal empowerment study conducted by the Asian Development Bank (ADB) – co-authored a report laying out the foundations of the concept.⁹ The authors sought to capture its meaning broadly and defined it as both a process and a goal.¹⁰ While legal empowerment overlaps with other concepts, such as the rule of law and judicial reform, the report underlines that legal empowerment's focus is not on judicial institutions or its actors, but on disadvantaged populations.¹¹ This shift by policymakers from institutional requirements to marginalized actors occurred incrementally during the globalization of rule of law practices. In recent decades, international development practices have resulted in a rhetoric of integration of underprivileged groups into emerging legal systems in different parts of the world.¹² Earlier development literature had pointed to the need for local agency and ownership in the field, but emphasised the socio-political, such as gender and communication.¹³ It was only over the course of time that discussions centred on law as a tool to enhance the power of local actors went beyond the boundaries of development scholarship.

The liberal and law-oriented discourse spread and eventually reached the field of transitional justice. Yet, this approach, as some observed, had its limits. As Dustin Sharp explains, this concept

has often resulted in a relatively narrow approach to questions of justice in transition that foregrounds physical violence, including violations of physical integrity and civil and political rights more generally, while pushing questions of economic violence and economic justice to the margins.¹⁴

Sharp's observation fuels a couple of critical remarks about legal empowerment. First, CLEP's definition of the legal empowerment concept appears to address broader socioeconomic issues that mainstream transitional justice processes do not focus on. There has been a trend in retributive transitional justice practices that law in post-conflict justice contexts is considered – among other things – a tool to make transitions efficient and measurable.¹⁵ Unfortunately, the legal empowerment discourse is in line with these data-driven practices in the legal field. Determining objectives and benchmarks that can be evaluated using quantitative data is one of the main goals pursued by advocates of the legal empowerment paradigm. In the past few years, reports issued by different international organizations have aimed at assessing the value of the concept. For example, the United Nations Development Programme (UNDP) has developed a legal empowerment knowledge bank, which contains various country reports and case studies, some of which concentrate on how to best assess and measure the successful implementation of the empowerment strategy.¹⁶ Open source knowledge banks are increasingly popular and unsurprisingly, other international institutions, such as the World Bank, have also pushed to create platforms for knowledge dissemination.¹⁷ Although the number of reports added to the online library is continuously growing, the value of these types of assessments remains questionable because of inadequate evaluation strategies.¹⁸

Second, such an approach illustrates the top-down nature of the activities put in place by bureaucratic international institutions, which often fail to include local perspectives in their policy strategies. Anna Di Lellio and Caitlin McCurn, for instance, capture the crux of the local involvement issue for transitional justice practices in Kosovo.

The institutional discourse on transitional justice insists that local knowledge and context-specific approaches lie at its heart. For Kofi Annan's report to the Security Council on transitional justice, the local, identified as the nation-state, is as important as international norms and standards. ... Yet, despite honest efforts to include locally owned initiatives, there is a fundamental aspect of the process on which local input is actively discouraged: the professional "toolkit" and its subordination to the goal of stability. This is evident in the focus that donors place on training, whether through workshops, conferences, or study tours, where local actors must listen more than be heard.¹⁹

It should be noted that 'local' here indicates the state, as it very often does in transitional justice discourse, ignoring the diversity of experience of transition and the very broad range of community needs of transitional justice *within* the nation state. Even where it is acknowledged that the local may include non-state and non-institutional actors, insufficient attention is often paid to the many different *locals* that exist, and the power relations that bind them. Similar critiques have been voiced from a number of advocates of the legal empowerment concept. Di Lellio and McCurn's study on the agency problem of local populations falls within a broader development and rule-of-law debate about knowledge transfer in developing countries, that some have criticized as a top-down approach implemented by international organizations.²⁰ A closer inspection reveals that at the heart of this issue lies the question of legitimacy.²¹ In order to re-establish the trust between international actors and local actors to

implement the rule of law on the ground, non-profit organizations have to not only be more actively involved but also create a better global network for improved communication and strategy implementation. James Goldston, the executive director of the Open Society Justice Initiative, suggests, “creating an international civil society consortium of leading rule of law actors to carry out collaborative projects in countries both South and North.”²² Yet, the gap between theory and practice runs deep. Almost a decade after conceptualizing the idea of legal empowerment, Stephen Golub – criticizing the 2008 CLEP report – deplores that although the concept itself remains a success, a clear implementation strategy is lacking. He regrets that the report “does not detail how such reforms will address the perverse power dynamics that permeate such institutions to begin with.”²³ The report advocates a top-down approach that aims at convincing national leaders to implement legal empowerment programs for the poor, instead of helping the underprivileged and marginalized to create their own agenda.²⁴

A lack of awareness of developments on the ground is one of the reasons for this disconnect. While the World Bank, one of the key organizations promoting the concept, is extending its reach and influence promoting legal empowerment in the developing world, it has a poor track record of evaluating these projects.²⁵ An assessment study of World Bank practices of legal empowerment and access to justice finds that “very little World Bank work explores legal approaches to holding public agencies and services accountable to citizens.”²⁶ The critique of legal empowerment advocates does not stop at issues of implementation strategy, but goes beyond it. As a case in point, legal empowerment cannot be implemented in a vacuum: it requires political and economic institutions and has to integrate a broad range of issues.²⁷ Some authors, like Dan Banik, further disapprove of CLEP’s limited focus, excluding as it does issues such as violence against women or education.²⁸ As a result, this article builds on the above criticism by legal empowerment advocates and further expands the debate to the field of transitional justice. Elaborating on the link between legal empowerment and transitional justice is crucial because of a variety of fields and concepts – including the rule of law, development and post-conflict justice, to name only a few – which grapple with a number of common issues. Below the authors outline several problems for transitional justice studies and the legal empowerment concept that should be addressed to improve the conditions for the disempowered on the ground.

The main issues centre on power, space and actors. In their discussion about rights-based approaches in development, Andrea Cornwall and Celestine Nyamu-Musembi, for instance, explain that questions related to rights of underprivileged populations are intrinsically linked to the politics of power.²⁹ Power remains in the hands of elites, as the empowerment discourse of international development actors only translates into a power transfer to national governments and elites. Such an approach puts the entire concept into question, as international development strategies are merely polished with a new rhetoric instead of being fundamentally re-conceptualised to address the needs of the marginal.³⁰ Yet, the creation of a space for the marginalized to form their voice and develop agency in order to participate in the process is essential for sustainable development and peace. For David Crocker voice can be achieved via deliberation:

In a society aspiring to be (more) liberal and democratic, public deliberation expresses the commitment to respect one’s fellow citizens and to enter into give and take with them so as to arrive at a democratic decision that all can live with, even though all do not agree with it.³¹

Moreover, Patricia Lundy and Mark McGovern, for instance, use the case study of Northern Ireland to describe how a locally-oriented and community-led strategy to addressing legacies of conflict was implemented, avoiding elite-driven and donor-centred policy implementation.³² While this case illustrates a transitional justice-oriented participatory approach, local legal empowerment initiatives in post-conflict contexts fuel only limited success stories. One of the main reasons for the questionable outcomes is CLEP’s top-down approach, which is associated with a number of problems, including imbalanced power relations, issues of identity, and a lack of voice for the marginalized.³³ With years of experience in diverse post-conflict justice settings, the authors have observed fundamental shortcomings in transposing legal empowerment practices into local contexts. These shortcomings encompass a number of issues including the lack of local agency, unstable political institutions, and as socio-economic cleavages that run deep in these societies as a result of years of conflict and political oppression. As a case in point, legal empowerment initiatives generally target contexts that are characterized by weak state institutions and a lack democratic leadership.³⁴ Typical developmental issues, such as resource constraints, also add to the overall institutional and structural problems.³⁵ Unsurprisingly, these issues also raise several questions with regards to legitimacy and accountability. In past work, the authors demonstrated that due to the technocratic approach of legal empowerment, organizations advocating for these practices emphasize a rights-based discourse, which often overlooks the basic needs of the populations in question.³⁶

Additionally, they showed that the institutions responsible for implementing reforms and introducing change in post-conflict areas often lack the trust of the people and struggle to establish their legitimacy.³⁷ Accountability falls within the same problem area. The legal mechanisms put in place to account for mass violence are often subject to question for various reasons, including the problem of using socio-political capital in political participation processes.³⁸ In order to illustrate the limitations of legal empowerment for post-conflict and transitional justice contexts, the authors elaborate on these different issues by drawing from their fieldwork in Nepal, Tunisia, and Bosnia.

Methods and design

This article uses qualitative research methods, to gain a detailed picture of a variety of both transitional justice processes and the societies in which they unfold, while also outlining and interpreting the politics that circumscribe them. To this end, it draws on three different case studies, Nepal, Tunisia and Bosnia-Herzegovina. Semi-structured interviews were the principle research method used in all contexts. The Nepal study is grounded in an ethnography of a socially excluded indigenous community in the district of Bardiya in the mid-western plains of the country. In Tunisia, the authors additionally employed document analysis, and in Bosnia-Herzegovina, participant observation. Case studies were chosen for geographic breadth and to represent a range of different types of transition.³⁹ While all case studies are characterized by post-conflict transition and address themes that are the focus of transitional justice initiatives by international organizations, the type of conflict, form of regime, current socio-political conditions and historical context vary greatly. The case study selection was made to enable analysis of different aspects of transitional justice processes, notably seeking to encompass the issues of marginalized and socially excluded populations in socio-political decision-making, the organizational framework of institutions on the ground and socio-political as well as socio-economic conditions in each of the cases. These various factors are then examined to evaluate the role of legal empowerment initiatives in each context.

Nepal: social exclusion, structural violence and the need for empowerment

Nepal is typical of many fragile states in political transition trying to overcome long histories of poor governance, poverty and violent conflict. Nepal's history of social exclusion, and the conflict to which it led, can provide valuable lessons concerning processes to address poverty and marginalisation as an integral component of ensuring long-term peace. Nepal's conflict was the product of a society built upon the codified exclusion of a majority of its people on the basis of caste, ethnicity, and gender.⁴⁰ A rigid system of social stratification ensured that indigenous people faced life expectancy, literacy rates, and income far below the nation's meagre average. The conflict was triggered by the declaration of a 'People's War' against the state by a small Maoist group in 1996, whose mobilization of the excluded was such that ten years later it had effective control of most of the territory. Following a ceasefire in 2006 and a tortuously slow political process, the Maoists are now a constitutional political party, their troops have been demobilised, and Nepal is seeking a political route to a dispensation prioritising inclusive development.

Ethnographic work undertaken with conflict-affected persons in the district of Bardiya in the mid-western plains of Nepal, is used to interrogate the relevance of legal empowerment to Nepal's socially excluded.⁴¹ Bardiya is a district of agriculturalists and one of only two where the indigenous Tharu people are a majority.⁴² Their marginalisation has been heightened as a result of high caste migration to the traditionally forested areas where the Tharu live in the last decades of the twentieth century, and the loss of their land to those settlers who shared language and culture with the ruling elite.⁴³ The result of this widespread loss of land accompanied by substantial debt was the creation of a class of bonded labourers among the Tharu, known as *kamaiya*: entire families constrained for generations to work for a landlord to pay off debts.⁴⁴

The Tharu were successfully mobilized by the Maoist movement, with the struggle over land and the People's War entwined in Bardiya. During the war, some higher caste landlords were driven off their lands and these redistributed by the Maoists to the landless. Since the end of the conflict however fundamental dynamics in the district have not been challenged. Qualitative work with conflict affected families and communities indicates that their priorities are not law-centred, but economic: families seek guarantees of livelihood, which are perceived as linked to land ownership, and as a result an ability to ensure education and healthcare for their families. Having seen the law used largely as an instrument against their community since they first encountered the Nepali state, they have little faith that it can serve them. When asked about their priorities, only 7% of victims of state forces during the conflict mentioned prosecution of perpetrators.⁴⁵

Legal empowerment has been one of the planks of intervention of human rights agencies working since the end of the war with

conflict affected communities. The very legalistic understanding of this has however taken the form of external experts, largely from ethnic and caste elites, meeting with victim communities and submitting cases on their behalf, and advocating for the prosecution of violations committed during the war.⁴⁶ There has however been no action from rights agencies around those issues most prioritised by the Tharu, notably social and economic rights. In particular, redistribution of assets – and most importantly that of land – remains entirely absent from rights discourse in Nepal, precisely because it is elite led.

It is clear that the Tharu of Bardiya seek empowerment to play a role in the ‘new Nepal’ that political leaders (of all parties) have promised. However, the empowerment they seek is social, economic and ultimately, political. They quite rightly perceive the law, both locally in terms of land ownership, and nationally, in terms of challenging the impunity of the state, as operating in an entirely political space. Presuming that the empowerment of the marginalised should be around law, rather than the everyday politics with which the disempowered live, is precisely to reinforce the subordinate position they occupy in decision-making. The Tharu of Bardiya have seen very significant resources devoted to the funding of rights agencies who spend their funds on the collection of testimony and the effort to inculcate in victim communities an appreciation of the importance of legal process concerning the crimes of the conflict. The Tharu community, however, has seen no benefit to date of eight years of such advocacy, and are largely denied access to the products of such process – currently restricted to reports – by their illiteracy. The leader of Bardiya’s principal victim’s group, which is predominantly Tharu, has identified the legal focus of such agencies as the perpetuation of the authority of high caste, largely Kathmandu-based, elites, who seek to deny the social and economic agenda that drove the conflict and replace it with a narrow, legally-based one that does not challenge traditional inequalities.⁴⁷ An extreme example of this legalism has been the efforts of a UN agency and an international NGO to offer legal advice to landlords displaced from Bardiya to help them regain their property, following Maoist seizure and redistribution of their land. This appears to local people as simply a political attempt on behalf of elites to return Nepal to a status quo that the conflict radically challenged. The danger of an empowerment strategy that is primarily legal is precisely that it uses a technical discourse largely unavailable to those most in need of it, resulting in the reinforcement of the power of ‘experts’, and elites who are comfortable in formal legal spaces.

The structural violence to which the excluded are subject is rarely an object of legal sanction for a range of reasons. For example, the feudal relations between landlords and tenant farmers in Bardiya are the product of a power relationship that is historically, culturally and financially rooted. Even where the law is being broken, local enforcement will be by those sympathetic to the cause of the high caste landlord, or who can be corrupted to be so. In post-conflict spaces it is precisely the failure of governance that is both a cause and a symptom of conflict, and that serves to emphasise power imbalances.

That women are also marginalised in Nepali societies was demonstrated by the interaction of patriarchy and victimisation in conflict. The wives of the disappeared are very often stigmatised by their in-laws and by their communities for no longer satisfying the narrow expectations of identity as daughter, wife or widow.⁴⁸ Challenging the resulting social exclusion – which occurs largely in private domestic spaces – cannot be done through force of law, but requires empowerment within the community and is inextricably linked to ending women’s economic dependence on men.

The unsurprising emphasis of the poor on addressing their poverty demands that one ask what role law can play in addressing chronic, structural violations of social and economic rights. The justiciability of such rights has long been discussed in theory, but in practice it has been a largely ineffective instrument.⁴⁹ Additionally, poor states emerging from conflict are likely to be in no position to prioritise ensuring that populations’ fundamental economic rights are met, when the resources to enable this are absent. In Nepal the social and cultural rights that should ensure that discrimination against the indigenous does not occur are guaranteed in Nepali law but have simply never been enforced. In a rural district like Bardiya it is the lack of political power of indigenous groups, even where in the majority, that ensures that institutions such as bonded labour continue.

The strategy that has been most successful for the Tharu, and that ultimately led to legal action against the *kamaiya* system, was a process of *conscientisation*. In the 1980s a Tharu-led NGO called BASE (Backward Society Education) was established with the key mission of educating the Tharu and challenging illiteracy.⁵⁰ What this led to was the first political mobilisation of the Tharu, including strike action, around the *kamaiya* issue. This in turn led to legislation outlawing bonded labour: but it was the mobilisation that led the legal advocacy, suggesting that collective political action is more effective than a narrow campaign for changes in the law, and potentially a prerequisite for it.

Access to justice in Nepal is highly constrained, both by geography in that police stations and courts are often far from rural populations, and by the fact that money is demanded by officials for almost any service provided.⁵¹ Post-conflict contexts such as Nepal are characterised by the poor quality of services provided by government: in the absence of adequate resources and given the quality of governance, access to justice will remain poor. As such, legal empowerment of excluded populations risks being met by a lack of governance capacity to respond to their demands. The informal justice sector is more accessible – Tharu

communities have an elder who mediates disputes. However, such figures have consistently been seen to uphold traditional patriarchal relationships within the community: these can be challenged, but through non-legal routes to empowerment. Such figures are anyway unable to impact upon non-Tharu hierarchies.

The example of Nepal's indigenous Tharu community is that addressing exclusion after conflict demands empowerment of the marginalised, but that the agenda goes beyond the legal. Indeed, the indication is that legal empowerment must be *preceded* by social, economic and political empowerment. This challenges a liberal understanding that individual rights are preeminent, when Nepal's indigenous communities see themselves as collectivities, and have demonstrated that their collective political participation is most likely to deliver social and legal change that benefits them.

Tunisia: social exclusion after revolution

Tunisia is also a state with a long history of poor governance, poverty and inequality. Thus, in the immediate aftermath of the 2011 Tunisian revolution expectations were raised that Tunisia's marginalized populations, and impoverished regions in the South and West of the country, could strengthen their rights and meet their needs in post-transition Tunisia through legal empowerment. However, three years after the Tunisian revolution, one particular social group, Tunisia's youth, failed to increase its power to participate in the decision-making process through law. Instead it was locked out of the post-authoritarian transition because of a politicized and elite-driven process. This elite driven process constitutes an important aspect of continuity with the past as external assistance aimed at empowering marginalized groups replicates pre-existing inequalities through an engagement with a small section of Tunisian civil society that is conversant with the international donor community and leaves broad sections of newly emergent groups excluded from taking advantage of new political openings provided by the 2011 Tunisian revolution.

The popular narrative of Tunisia's 14 January 2011 revolution has the country's youth at its core. Tunisia's youth, having previously been seen as either marginalized or co-opted by the Ben Ali regime's ruling party (the *Rassemblement Constitutionnel Democratique* (RCD)) were perceived in the aftermath of the Tunisian revolution to have played a crucial role in sending Ben Ali into exile.⁵² Indeed, the self-immolation of a 26 year-old fruit vendor, Mohammed Bouazizi, set off a nationwide wave of protests that ultimately culminated in the overthrow of a deeply entrenched authoritarian regime that had presided over Tunisia since 1987.⁵³ However, underlying this popular narrative is a genealogy of contentious youth politics and demands for social justice that long predate Bouazizi's self-immolation in 2010.⁵⁴ To be sure, throughout the 2000s the Ben Ali regime sought to address Tunisia's increasingly assertive youth population, which was confronted with the consequences of official graft and high unemployment. These structural challenges severely impacted Tunisia's youth by erasing prospects for advancement, which were almost non-existent among marginalized socio-economic groups.⁵⁵

The Tunisian case study highlights that youth were disproportionately affected by socio-economic exclusion, which was the product of the Ben Ali regime's notorious plunder of Tunisia's economic resources. Despite the RCD's attempts to co-opt Tunisia's youth, a growing awareness of corruption within a regime that controlled every sector of the economy from business and banking to agriculture fuelled youth discontentment with the ruling party. High profile acts of corruption, such as those highlighted in *Wikileaks* cables from the U.S. Embassy in Tunis released in 2010, served to further deepen public outrage with the Ben Ali regime. Thus, when Bouazizi set himself alight in a public display of defiance and desperation, the message of despair that this act communicated, resonated across Tunisia and was reproduced by youth activists who demanded the fall of the Ben Ali regime.

It was therefore not surprising that initially, self-empowered demands for accountability for past corrupt practices were the main focus of transitional justice debates in the immediate aftermath of the 14 January revolution. For youth activists who demanded the departure of Ben Ali and his ruling party, stripping members of the ruling party of wealth acquired under the old regime in the name of social justice was a common refrain. Furthermore, in addition to demands for accountability for graft, youth political mobilization continues to emphasize key themes, such as access to employment, that were first articulated during the Ben Ali era.⁵⁶

Within months of the January 14th revolution, Tunisia's interim authorities sought to address some of the grievances that had brought Tunisia's youth on to the streets in December 2010 and January 2011. Tunisia's interim Minister of Finance Jalloul Ayed announced a series of measures, known as *Ama*/or hope, on April 1, 2011 aimed at reducing youth unemployment;⁵⁷ however, Boubakri and Boujneh point out that despite the revolution having created a political space in which youth can openly criticize Tunisia's post-revolutionary authorities, socio-economic inequalities remain a debilitating constraint on Tunisia's transition.⁵⁸

Another constraint, questioning Tunisian legal empowerment strategies, has been fostered by the international donor community. Despite a discourse that emphasizes strengthening local ownership of the transitional justice process, international assistance targeted elites, and in particular the Tunisian government, with workshops, conferences and trainings that were far removed, and largely inaccessible for those Tunisians from socially marginalized groups. As noted by one civil society informant during an interview in April 2014, international donors have worked with the Tunisia's government's preferred civil society partners rather than engage with groups that include marginalized voices from Tunisia's impoverished regions.⁵⁹

An example of this was the Tunisian government's attempt to empower youth by engaging them through the transitional justice process. Tunisia's national consultation on transitional justice was launched with the participation of the International Center for Transitional Justice and the UNDP on April 14, 2012. However, despite the national consultation culminating in a transitional justice law that was ratified by the National Constituent Assembly in December 2013 youth participants felt disillusioned that many of their socio-economic concerns were not reflected in the transitional justice law. Rather, it focused for the most part on the establishment of a truth and reconciliation commission. Overall, transitional justice in Tunisia, has been largely a top-down process in which Tunisia's Ministry for Human Rights and Transitional Justice played a central role in both coordinating transitional justice measures among Ministries, but also acting as a gatekeeper for civil society involvement in Tunisia's official transitional justice processes.

In addition to a top-down transitional justice process managed by the Ministry for Human Rights and Transitional Justice, Tunisia's post-revolutionary transitional authorities have left Tunisia's youth outside transitional governing institutions. Instead of fulfilling the political promise and empowering youth to participate in the decision-making process through law, ruling elites have disenfranchised youth of their political involvement. Despite an attempt by Tunisia's major political parties to engage youth through youth political party organizations, Tunisia's youth have largely found themselves excluded from leadership roles within Tunisian parties. Tunisia's transition has been managed by elites, who are two generations removed from Tunisia's youth, in part because of the political exclusion of an entire generation of political elites through political exclusion laws that barred former leading figures within the RCD from post-transition politics. The result of these exclusionary practices has been that rather than turning to Tunisia's youth, Tunisian political parties have looked back toward those whose political activities preceded 1987, which has resulted in a generation of elderly politicians taking the lead in Tunisia's transition. Illustrative of this is the fact that the leaders of Tunisia's two largest political blocs, Beji Caid Essebsi and Rachid Ghannouchi, are 87 and 73 years of age respectively.

In sum, the Tunisian case highlights that the international goal of empowering the local and underprivileged has resulted in a technocratic approach that has largely focused on providing assistance for institutions, and a narrow segment of elite civil society. It has largely failed to address those concerns, which brought Tunisia's youth to the streets in 2010 and 2011. Despite the opportunity to integrate them into the transition, elites controlling the process avoided strengthening the political power of the revolution's initial driving force. Although current political stakeholders could have guaranteed Tunisia's youth constitutional participation rights, they preferred to exclude them from the decision-making process. The country's transition has nonetheless proven exemplary among those states impacted by the Arab Spring, with political assassinations and political polarization failing to derail Tunisia's constitution drafting process. Yet, in spite of the ratification of a new constitution in January 2014, Tunisia's youth continue to take to the streets to voice demands for social justice that up until now remain to be addressed.

Bosnia-Herzegovina: weak institutions, lack of accountability, and eroding legitimacy

The violent disintegration of the former Yugoslavia in the 1990s affected Bosnia-Herzegovina especially hard. Over two decades after the outbreak of the conflict, the country is still facing daunting economic, political and social obstacles that impede the prospects for sustainable peace and development. Steep unemployment rates, particularly among the younger generation,⁶⁰ and exclusionary politics burden the daily lives of Bosnians. While the 1995 Dayton Peace Agreement put an end to the violent conflict in Bosnia-Herzegovina, its policy goals posed a myriad of problems for a long-term democratic transition process. One of the main issues was the incessant political tensions and confrontations at the different polity levels between the three principal ethnic groups consisting of Bosniaks, Croats, and Serbs.⁶¹ The fragile internationally-monitored Bosnian state structures and a number of closely related problems bear witness to the difficulties associated with implementing viable transition strategies. With limited success at the macro level, rights-based micro-level approaches, such as legal empowerment, are unlikely to contribute to a ground-breaking evolution of Bosnian socio-political conditions. Quite the contrary, in fact, as unstable government politics have recently provoked a crisis leading to the erosion of public support and a loss in legitimacy of political institutions and elites ruling the country.

A review of local initiatives, such as Vaša Prava, confirm the hypothesis of several legal empowerment advocates that strengthening the rights of marginalized populations requires political institutions with the capacity to implement reforms and to provide a number of services.⁶² While basic services exist for the most part across Bosnia-Herzegovina's government institutions, the quality of the services often varies depending on the geographical location. In the case of Vaša Prava – a domestic non-profit organization created in 2003 that provides free legal services to disadvantaged populations such as refugees, returnees, and displaced people – conditions on the ground quickly revealed the limited impact of its activities. In spite of the initiative's support to refugees helping them overcome administrative and legal hurdles upon their return home,⁶³ Vaša Prava's work fell short in addressing deeper structural issues within a highly divided society. A 2010 report evaluating its activities provides nonetheless a positive review of the non-profit organization's involvement in the region.⁶⁴ According to the author,

Vaša Prava lawyers regularly invoked the European Convention on Human Rights in seeking judicial relief from unlawful actions. The organization also conducted numerous seminars and training sessions for government officials to educate them about their responsibilities ... [and] broadened its reach by launching systemic advocacy campaigns.⁶⁵

Under closer scrutiny, however, the report discloses the elite-driven strategy applied throughout the process, epitomized by high-level training sessions of government officials.⁶⁶ The projects seem less like a step toward empowering local populations than introducing global international human rights norms into an institutional environment that has not built the required capacity to absorb these demands – despite almost two decades of democratization and peace-building by the international community and the European Union. As a result, practices to integrate marginalized populations follow the traditional top-down approach that bear little resemblance with the ideological concept of legal empowerment that stresses the importance of strengthening local communities.

Social exclusion is another conundrum that remains to be addressed during the country's transition. It affects particularly minorities and disadvantaged populations, including Roma, refugees, and women. While rights-based approaches to improve the situation in a number of these cases have been implemented in recent years,⁶⁷ many individuals require support that is needs-based instead of rights-based. For instance, several authors have underlined the importance of establishing domestic legislation in line with international law to provide domestic violence victims with legal tools to break the silence and prosecute their offenders.⁶⁸ Before victims can deal with legal questions, however, more immediate needs have to be addressed, such as physical protection from their perpetrators. Several non-governmental organisations in Bosnia-Herzegovina, for instance, have played a pivotal role providing access to domestic violence shelters.⁶⁹ Their work underlines that prioritizing individual needs instead of dealing with rights-based questions, can have a direct impact on individual safety and well-being.

The tension between needs and rights has also been at stake when crafting adequate transitional justice strategies to deal with the past in the aftermath of the Balkan conflict. Interestingly, post-conflict justice across the region, despite a growing bottom-up discourse,⁷⁰ has been characterized by a top-down – and repeatedly technocratic – approach to accountability for war crimes and to deal with the past. The rhetorical shift from the “rule of law” to “legal empowerment”, which now goes beyond criminal legal aid and also encompasses civil legal aid, is unlikely to change practices on the ground. A brief review of past post-conflict justice efforts in the Balkans exposes the inherent problems that a rights-based approach with the goal of serving disadvantaged populations entails. While the United Nations Security Council evoked the principle of the rule of law during the conflict in the Balkans to promote peace and stability by creating the International Tribunal for the Former Yugoslavia (ICTY),⁷¹ today's legacy of the tribunal remains controversial.⁷² The long-hoped for legal spillover effect of international humanitarian law into domestic courtrooms has faced a number of difficulties. Moreover, legal aid to witnesses and victims in trial procedures was riddled with problems.⁷³ Due to the shortcomings of retributive justice, grassroots organizations launched an initiative to establish a regional truth commission called RECOM Coalition in 2005.⁷⁴ In the beginning, the initiative was successful and promising, because it advocated a victim-centred approach. As the movement gained momentum, however, the objectives and the strategy within the leadership of the RECOM Coalition shifted, promoting an elitist perspective that overlooked the needs of local populations.⁷⁵ Similar to the initially bottom-up restorative justice processes in the former Yugoslavia, current legal empowerment strategies operate within an elite-driven environment, that risks alienating the underprivileged target group. The lack of stable and transparent government institutions only exacerbates the conditions for success on the ground.

As mentioned earlier, legal empowerment requires an institutional system that people can trust. The public trust in the Bosnian political structure, however, has slowly eroded over the years. The recent social uprisings in many towns and cities across the country alarmingly stress that society has lost confidence in political elites, who, according to the CLEP report, would be necessary to introduce wide-ranging reforms to improve individual rights at the local level. The first widespread protests since the end of the war in 1995 occurred in spring 2013, when citizens in Sarajevo formed a human chain around the parliament to force policymakers to pass a law that would guarantee the issuance of identification cards after an old law had lapsed, leaving many new-borns without identification.⁷⁶ While last year's protests were peaceful, the riots that broke out in Tuzla in February 2014,

escalated in violence and have reached other towns such as Sarajevo, Brčko and Mostar, among others.⁷⁷ The public anger was sparked by workers who were laid off in Tuzla after a factory closed down due to the prolonged economic crisis and the inability of the national government to spur economic growth and prosperity in the region. The intensity of the protests is a sign of acute disapproval of government policies.⁷⁸ The current political mayhem in Bosnia-Herzegovina exposes the eroding legitimacy of the national government and the political system that was put in place by the Dayton Peace Agreement. Given the required institutional structure necessary to successfully implement a narrowly focused rights-based approaches to empower local communities, the likelihood to close the deep socio-political cleavages within Bosnian society is slim. As with the case of Nepal and Tunisia, priority should not be given to legal reform at the local level, but instead, current developments point to the need for structural change that can only come from within society and will help put an end to corruption, mismanagement and political gridlock.

Conclusion

The cases of Nepal, Tunisia and Bosnia-Herzegovina have underlined the difficulties resulting from applying legal empowerment strategies in post-conflict contexts. The set of issues generally associated with the use of legal instruments to aid empowerment of local populations in these settings include on the one hand the problem of adequately addressing the need of the affected and marginalized; and on the other hand, the conundrum of fragile institutions in these areas and poor governance. While mobilisation of remote Nepalese communities could foster more promising change than narrow legal reforms, collective action in Tunisia did not fuel the much hoped for social change and participation in the political process for marginalised youth. Moreover, the example of Bosnia-Herzegovina illustrates the perverse effects of top-down generated reform processes that lead to a lack of trust and ultimately a loss of legitimacy in the institutions and their leadership. The increasing distrust, however, cannot simply be solved by introducing yet another layer of legal instruments to cope with the intricate social and economic problems that emerge after conflict or regime change. Although this article discussed only three cases, these can serve as a catalyst for further analysis with additional in-depth comparative work to map promising strategies for marginalized populations in post-conflict settings. It is also an incentive to look beyond the widely hailed liberal approach in recent years and emphasise the need for social and economic change at the structural level.

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51

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